

FILED

JUN - 8 2006

**CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

BY
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SCOTTSDALE INSURANCE COMPANY,

Plaintiff,

v.

HENRY MORENO, ROSE A. MORENO, LA
MANSION DEL RIO, WALTER HARVEY,
and DOES 1 through 100,
inclusive,

Defendants.

CASE NO. S-02-1890 WBS GGH

**STIPULATION AND [PROPOSED] ORDER
REGARDING ADMISSIBILITY OF
UNDISPUTED FACTS IN LIEU OF
PRESENTATION OF EVIDENCE AT TRIAL**

[L.R. 83-143]

Trial Date : June 13, 2006

Time : 9:00 a.m.

Dept : Court Room No. 5

Judge : William B. Shubb

Plaintiff SCOTTSDALE INSURANCE COMPANY and Defendant WALTER
HARVEY, through their respective counsel of record, hereby enter
into this stipulation regarding the admissibility of undisputed
facts in lieu of presentation of evidence at trial commencing on
June 13, 2006 at 9:00 a.m., in the above-referenced United States
District Court for the Eastern District of California.

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This stipulation is entered by and between the parties so as to facilitate trial of this matter, is binding on the parties and relieves each of producing evidence to prove the stipulated facts. Spaulding v. City of Tulsa, Oklahoma (10th Cir. 1996) 95 F.3d 1492, 1501-1502. Moreover, the scope of this stipulation includes both the matters actually stipulated, as well as, reasonable inferences that may be drawn therefrom. United States v. Baker (9th Cir. 1979) 589 F.2d 1008. By entering into this stipulation neither party waives and expressly reserves the right to request a jury instruction regarding the effect of this stipulation. While stipulations conclusively establish a fact, the factfinder ultimately determines the weight to be given the stipulated fact. O'Connor v. City & County of Denver (10th Cir. 1990) 894 F.2d 1210, 1225-1226. Nothing in this stipulation is intended by either party to define the scope of issues that are to be presented to a jury and the following stipulated facts may be relevant to jury questions, Court determinations, or both.

The stipulated facts are as follows:

I. FACTS REGARDING THE SCOTTSDALE INSURANCE COMPANY POLICY.

1. Scottsdale Insurance Company ("Scottsdale") issued a general liability insurance policy number CPS0238393 to named insured Henry A. Moreno (d/b/a La Mansion Del Rio) (hereinafter the "Scottsdale Policy").
2. The Scottsdale Policy incepted on April 23, 1998.
3. The Scottsdale Policy provides, in relevant part:
 - a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this

insurance applies. [...]

b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence"...; and
- (2) The "bodily injury" or "property damage" occurs during the policy period.

4. The Scottsdale Policy defines "occurrence" as "an accident, including continuous exposure to substantially the same general harmful conditions".

5. The Scottsdale Policy defines "property damage", in relevant part, as "physical injury to tangible property, including all resulting loss of use of that property...".

II. FACTS REGARDING THE HARVEY/MORENO PROPERTIES.

6. Scottsdale's policyholder Henry Moreno (d/b/a La Mansion Del Rio) was developing the property for a restaurant on the Sacramento River, specifically identified as 2125 Garden Highway, Sacramento, California (the "Moreno Property").

7. Defendant Walter Harvey owned property located approximately 100 feet downriver from the Moreno Property, specifically identified as 2111 Garden Highway, Sacramento, California (the "Harvey Property").

III. FACTS REGARDING CONFIGURATION OF THE HARVEY DOCK FACILITY.

8. Prior to 1998, Defendant Harvey constructed a dock facility on his property (the "Harvey Dock Facility").

9. The Harvey Dock Facility consisted of various components, including, but not limited to, access ramps, a floating barge, pile rings, several piles, boat barge, dock, and

1 a debris deflector.

2 10. To gain access from the shoreline, one would walk down
3 the access ramp to the floating barge.

4 11. The barge was constructed of steel plates, with various
5 internal compartments separated by bulkheads.

6 12. The barge was about 18 feet wide by 30 feet long.

7 13. The barge was about four-and-one-half to five feet
8 deep.

9 14. So that the barge and attached dock components would
10 not float downstream, the barge was attached to two metal piles.

11 15. For purposes of this action, a pile is defined as a
12 column usually of timber, steel, or reinforced concrete driven
13 into the riverbed to carry a horizontal load.

14 16. In this case, the two piles anchoring the barge were
15 made of 24" diameter, 5/8" thick steel.

16 17. In this case, the two steel piles were driven into the
17 bed of the Sacramento River.

18 18. The barge was attached to the piles by use of two pile
19 rings. The pile rings were constructed out of a heavy steel pipe
20 which were welded into a square shape.

21 19. The feet of the squares were welded to the barge.

22 20. The opening of each square enclosed a steel pile.

23 21. One purpose of the pile/pile ring mechanism was to hold
24 the barge next to the piles.

25 22. One purpose of the pile/pile ring mechanism was to
26 allow the barge to rise and fall with the level of the river.

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23. Up river and in front of the barge was a debris deflector.

24. The debris deflector was twenty-four inch diameter steel extending sixty-five feet out into the Sacramento River at a forty-five degree angle.

25. The purpose of the debris deflector was to take objects floating in the river and direct them out into the river and away from the docking facility.

26. The barge also included pumps which were used to pump out excess water from the barge compartments.

IV. FACTS REGARDING HENRY MORENO'S DOCK FACILITY.

27. Prior to 1998, Defendant Harvey's neighbor Henry Moreno decided to construct a dock facility on the property he was developing.

28. Although Henry Moreno started this dock construction project, it was never completed.

29. As part of and during the dock construction project, Henry Moreno obtained portions of an unused dock consisting of styrofoam topped with a layer of concrete (hereinafter "dock sections").

30. Henry Moreno temporarily secured the dock to his property by use of ropes.

A. Concrete Sections From Henry Moreno's Planned Dock.

31. Defendant Harvey was concerned that the ropes used by Henry Moreno to temporarily secure his dock to his property were insufficient given the currents and seasonal fluctuations of the Sacramento River.

1 32. Defendant Harvey was concerned that pieces of Henry
2 Moreno's dock would break free.

3 33. Defendant Harvey was concerned that if pieces of Henry
4 Moreno's dock broke free they may float down river and impact his
5 docking facility.

6 34. Defendant Harvey asked Henry Moreno to secure his dock
7 with steel cables.

8 35. Henry Moreno did not secure his dock with steel cables.

9 36. In late 1997 or early 1998, pieces of Henry Moreno's
10 dock broke free and some became lodged in Defendant Harvey's
11 debris deflector.

12 37. In late 1997 or early 1998, no damage occurred to
13 Defendant Harvey's dock facility from these dock pieces.

14 38. In late 1997 or early 1998, Defendant Harvey asked
15 Henry Moreno to remove the pieces of the dock sections caught on
16 the debris deflector. Henry Moreno complied.

17 39. During May of 1998, Defendant Harvey had boats moored
18 to his dock facility.

19 40. During May of 1998, a piece of Henry Moreno's dock
20 broke free, traveled downstream, went underneath Defendant
21 Harvey's debris barrier and impacted Harvey's Chris Craft boat.

22 41. As result of the above-stated impact, the hull of
23 Defendant Harvey's Chris Craft was breached requiring it to be
24 brought to dry dock for repair.

25 42. Defendant Harvey told Henry Moreno about the damage to
26 his boat.

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43. Repair of the boat cost about \$7,400.00.

V. FACTS REGARDING HENRY MORENO'S RENOVATION WORK.

44. During 1998, Henry Moreno was renovating the property he was developing so as to convert it into a river-side restaurant known as La Mansion Del Rio.

45. In the Spring of 1998, Defendant Harvey observed that Henry Moreno was placing construction materials, branches, tree trimmings and pieces of carpet in the river (hereinafter "construction debris").

46. Some of the construction debris impacted Defendant Harvey's debris deflector and a portion came in contact with Harvey's dock facility.

47. In July 1998, Defendant Harvey observed a stock-piling of tree branches, bricks and sheetrock on Henry Moreno's property (hereinafter "additional construction debris").

48. This additional construction debris was piled right next to the Sacramento river.

49. Concerned that this additional construction debris would be dumped into the river and create a hazard or possibly become entangled with his marine docking facility, Defendant Harvey spoke with Henry Moreno about Harvey's concerns.

50. Defendant Harvey explained to Henry Moreno that not all of the construction debris floats.

51. In July 1998, Henry Moreno directed employees, including Mr. Meteku Dingle and Mr. James Williams, to dispose of several logs into the river.

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1 52. Henry Moreno or his employees also placed portions of
2 felled trees cleared from his property into the river over a
3 period of three to four weeks.

4 53. Some of these logs traveled down river, evaded the
5 debris deflector and impacted Defendant Harvey's dock facility.

6 54. As a result, a seam on one of the compartments on the
7 port side of the barge opened up. Defendant Harvey reported this
8 to Henry Moreno.

9 55. As a result of the opened seam, water leaked into
10 Defendant Harvey's barge.

11 56. Defendant Harvey attempted to fix the leak by sealing
12 the seam with epoxy.

13 57. After the barge hull was breached, Defendant Harvey
14 used-additional pumps to remove water from the barge.

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16 **VI. FACTS REGARDING A LOG BECOMING WEDGED BETWEEN HARVEY'S BARGE**
17 **AND ONE OF THE TWO PILINGS.**

18 58. Two logs became wedged between the barge and one of the
19 two pilings to which the barge was attached.

20 59. While one of the logs was removed, the other remained
21 wedged between the pile and the barge hull.

22 **VII. THE DISAPPEARANCE OF HENRY MORENO.**

23 60. In August 1998, Henry Moreno disappeared. To date, his
24 whereabouts are unknown.

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VIII. FACTS REGARDING DEFENDANT HARVEY'S DOCK FACILITY
SINKING IN NOVEMBER 1998.

61. On or about November 28, 1998, Defendant Harvey's dock facility sank.

IX. FACTS REGARDING THE UNDERLYING LAWSUIT.

62. On July 23, 1999, Harvey filed a complaint against, among others, Henry Moreno and La Mansion Del Rio in Sacramento County Superior Court, Case No. 99AS04107 (the "Underlying Action").

63. Plaintiff Scottsdale defended its insured Mr. Henry Moreno (d/b/a La Mansion Del Rio) in the Underlying Action.

64. Trial in the Underlying Action took place from June 11 to June 14, 2001.

65. On or about June 19, 2001, the jury reached a verdict and a judgment was entered in favor of Harvey and against Mr. Henry Moreno for \$445,375.00 which included was for the loss of the dock facility and the Chris Craft.

DATED: May 30, 2006

SELMAN BREITMAN LLP

By: /s/

LINDA WENDELL HSU (SBN 162971)

JAMES R. TENERO (SBN 201023)

Attorneys for Plaintiff

SCOTTSDALE INSURANCE COMPANY

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1 DATED: May 30, 2006

BORTON, PETRINI & CONRON LLP

2
3 By: /s/ MARK S. NEWMAN
4 (as authorized on May 30, 2006)
5 MARK S. NEWMAN (SBN 107012)
6 Attorneys for Defendant
7 WALTER HARVEY


8 DATED: May 30, 2006

LAW OFFICES OF POOLE & PEREIRA

9 By: /s/ PAUL A. PEREIRA
10 (as authorized on May 30, 2006)
11 PAUL A. PEREIRA (SBN 128539)
12 Attorneys for Defendant
13 WALTER HARVEY

14 IT IS SO ORDERED,

15 DATED: May 31, 2006

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17 WILLIAM B. SHUBB
18 UNITED STATES DISTRICT JUDGE
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